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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,

Defendant/Petitioner,

vs.

LESTER K. ROY,

Plaintiff/Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

This Petition seeks review of a decision of the Fourth District Court of Appeal which affirmed a judgment for compensatory and punitive damages against AMERICAN CYANAMID COMPANY in a products liability case. 466 So.2d 1079 (Fla. 4th DCA 1984). The chemical involved was acknowledged to be inherently dangerous; the issue is whether the warning on the bag was in fact adequate and, if inadequate, was it so willfully, wantonly, and maliciously inadequate as to warrant the imposition of punitive damages.

AMERICAN CYANAMID COMPANY (CYANAMID) respectfully suggests that the decision of the Fourth District is in conflict with the following decisions:

1. The decision of this Court in Tampa Drug Company v. Wait, 103 So.2d 603 (Fla. 1958) establishes the general duty that a manufacturer of an inherently dangerous product must satisfy to avoid the imposition of compensatory damages -- it knew or should have known of the dangerousness. The Fourth District has taken that same duty and utilized it as the standard now to be employed in the Fourth District to assess punitive damages against a manufacturer of an inherently dangerous product. Such a standard is contrary to Tampa Drug and to this Court's decision in White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984), requiring more than even gross negligence to assess punitive damages.

STATEMENT OF THE CASE AND FACTS

CYANAMID manufactures a product known as AM-9, which is made up 95% of Acrylamide. This chemical, as a neurotoxin, may adversely affect the nervous system. It does not affect all

individuals, even at highly concentrated levels. The inherently dangerous nature of AM-9 (a chemical grout that fulfills a most useful purpose in society, particularly in sewer work) was discovered early in its development by CYANAMID through an extensive research program funded by CYANAMID. The results of this research program have been widely published and expanded for over thirty years.

Over the years, CYANAMID has, from time to time, changed the warning label and the extensive instructions on use of the product on the bags of the grout, based upon its evaluation of the ongoing research program.

Mr. LESTER ROY (ROY) worked with AM-9 for approximately ten years with two different employers. As a result of this contact, he claimed to have suffered a contact dermatitis and claimed to have a diffuse peripheral neuropathy causing physical problems.

At the trial in this cause, there was conflicting evidence as to what was causing Mr. ROY's complaints, but the jury obviously concluded that exposure to AM-9 contributed to his problems.

CYANAMID's warning label provided, among other things, "Warning: Repeated skin contact, inhalation or swallowing <u>may</u> cause nervous system disturbances ..." (Emphasis added). Plaintiff's labeling expert felt the warning was inadequate, preferring it to say "will" cause problems.

AMERICAN CYANAMID's label was in compliance with the guidelines of the Manufacturing Chemists Association, an industry guideline, as well as the federal transportation guidelines

(mandatory) which adopt the Manufacturing Chemists Association system.

There is no issue concerning CYANAMID's knowledge of the dangerous nature of the product which, in the words of the Fourth District, can cause dermatitis, neuropathy, and ataxia "in some people extensively exposed to AM-9." (Emphasis added).

The jury awarded Mr. ROY compensatory damages of $292,000, punitive damages of $45,000, and his wife consortium damages of $12,500.

The Fourth District affirmed this decision in an initially unanimous opinion which is attached as an exhibit to this brief. In upholding the punitive damage award, the Fourth District established this standard for punitive damages:

> When it comes to punitive damages, however, as contrasted with mere liability, we cannot envisage the level of intent or conscious indifference required to impose punitive damages, absent knowledge or opportunity to know. Slip Opinion at 5.

CYANAMID challenged the panel's decision by a motion for rehearing, a motion for rehearing en banc, and a suggestion for certification of question of great public importance. Each was denied by the Fourth District. The motion for rehearing, however, did result in one member of the original majority dissenting and stating:

> Upon reflection, I believe we made a mistake in approving the award of punitive damages against Appellant. The facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons such as the Appellee.

466 So.2d at 1085.

The notice to invoke discretionary jurisdiction was timely filed in the lower court by Petitioner.

SUMMARY OF ARGUMENT

In Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958), this Court stated that, to hold a manufacturer of an inherently dangerous product liable for compensatory damages, a plaintiff must show that the manufacturer knew or should have known of the dangerousness of its product. The Fourth District has now stated that it can think of no standard for the intent or indifference needed for punitive damages except that same test of "knew or should have known."

This test is diametrically opposed to this Court's recent and rigid adherence to the rule of Carraway v. Revell, 116 So.2d 16 (Fla. 1959), in White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984). The conflict with White Construction is made manifest by noting that every other Florida products liability case imposing punitive damages had direct and material evidence that the manufacturer had concealed unfavorable evidence disclosing the defect, or coerced employees into not disclosing, let alone attempting to remedy, the defect. At most, CYANAMID's warning (complying with all industry and legal standards) was found to be insufficient.

POINT ON DISCRETIONARY REVIEW

THE DECISION OF THE FOURTH DISTRICT IS IN JURISDICTIONAL CONFLICT WITH THE DECISIONS IN TAMPA DRUG CO. v. WAIT, 103 So.2d 603 (Fla. 1958) AND WHITE CONSTRUCTION CO. v. DuPONT, 455 So.2d 1026 (Fla. 1984).

A complete understanding of the jurisdictional issue before this Court -- the proper role and standard for the imposition of punitive damages in a products liability case relating to an inadequate (as opposed to absent) warning of an inherently dangerous product -- requires a recitation of that which this case is not.

1. It is not a case where the defendant hid, concealed, or refused to acknowledge the dangerousness of its product. Compare, e.g., Johns-Manville, infra, Piper, infra. CYANAMID, through its own extensive research program, in house and in the academic medical community at large, discovered the true nature of this most valuable product and disseminated the information widely.

2. It is not a case where the manufacturer refused to warn of the dangerous product. It was a situation where the Plaintiff's labeling expert disagreed with the make-up of CYANAMID's extensive warning label.

3. It is not a case in which the defendant failed, refused or neglected to comply with any applicable standard. Instead, the CYANAMID product was shown to have been in compliance with the comprehensive industry standard, and it was shown that that industry standard had been adopted by the federal government as

the mandatory standard for the transportation of dangerous products.

4. Finally, it was not a case in which the product was defective. It is essential to note that the "defect" said to exist in this case was the inadequate warning. The product was acknowledged to be inherently dangerous from day one of this case. The only thing that would make it "unreasonably dangerous" would be the warning said to be inadequate.

What this case is is one in which a company manufactured a product which, to some people in some applications, could cause neurological problems. It did not affect all people adversely and did not cause the same effects in all people who were affected.

This is a case which showed that since the product's development in the early 1950's, CYANAMID constantly tested and evaluated in house, and funded and published research in the academic and medical communities, to determine and disclose the nature of this most useful product. CYANAMID readily admits that there was trial testimony from the Plaintiff's labeling expert that he would have used a label that was more "startling." He advocated the use of the word poison and the inclusion of a skull and crossbones. This is notwithstanding the fact that there was no evidence, ever, anywhere, that Acrylamide has caused the death of any human being under any circumstances.

In this context, this Court's seminal decision in Tampa Drug must be examined for jurisdictional conflict. To establish a case of compensatory damage liability against the manufacturer of an inherently dangerous product, this Court stated in Tampa

Drug, 103 So.2d at 609:

> The burden remains on one who claims a negligent failure to warn of an inherent danger to prove that the distributor knew or by the exercise of reasonable care, should have known, of the potential danger and in the reasonable course of business, should be able to foresee the possible uses of the commodity, as well as the potential damage or injury that might result from such use.

Against this standard for liability, which is not here challenged, the Fourth District in its penultimate paragraph on punitive damage liability, created this standard:

> When it comes to punitive damages, however, as contrasted with mere liability, we cannot envisage the level of intent or conscious indifference required to impose punitive damages, absent knowledge or opportunity to know.

466 So.2d at 1083.

What the Fourth District has done, at least in a case of an inherently dangerous product, is to equate this Court's standard for compensatory damage liability with the standard of conduct sufficient to impose punitive damage liability.

A party's knowledge, or opportunity to have knowledge of a dangerous condition can quite properly create the obligation to warn and to warn adequately. For punitive damages, however, it is not the knowledge of the dangerousness of the inherently dangerous product, it is the knowledge of the defect (here the warning) and the refusal to do anything about it.

By the decision of the Court below, AMERICAN CYANAMID has been found punitively responsible for a defect (the inadequate warning) when there was no evidence that it knew the warning was defective. There is no question that the product "may," "can," or "could" cause injury under certain circumstances and that

CYANAMID knew it could. There is absolutely no evidence, however, that the product will cause injury and, in fact, the evidence negates that comprehensive effect. Nevertheless, that is what the Plaintiff's expert wanted.

By creating a punitive damage standard that exactly overlaps the compensatory damage standard, the Fourth District has simultaneously created jurisdictional conflict with this Court's decision in White Construction, supra. There, in reaffirming the Carraway v. Revell standard, 116 So.2d 16 (Fla. 1959), this Court noted that more than gross negligence is required to impose punitive damages and that the conduct must evince a reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or the entire want of care raising a presumption of conscious indifference. This Court's standard in White Construction may or may not be a turning away from the recent trend to include punitive damages in virtually every tort lawsuit, but at the very least, it is a clear and explicit rejection that a standard as simple as "knew or should have known" is sufficient to impose punitive damages in a products liability case.

The compensatory damage standard in a products liability case involving an inherently dangerous product is spelled out in Tampa Drug and the punitive damage standard (at least in all other cases) is spelled out in White Construction. The Fourth District has equated "knew or should have known" with punitive damages. Where the face of the opinion demonstrates that the manufacturer continued in a deliberate attempt to investigate, warn, and inform the community, the imposition of punitive damages is in

jurisdictional conflict with these two decisions.

Five cases before this case have addressed the imposition of punitive damages in a products liability setting under Florida law. In each of those cases, there was direct evidence that the defendant manufacturer was involved in a deliberate cover up, coercion of employees, and suppression of reports or tests that specifically told it that its product was defective. CYANAMID must acknowledge that none of those cases expressly requires the "smoking gun" of corporate cover up or coerced employees, but each of them prominently feature that aspect. Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984) (massive discussion at 249-51); American Motors Corp. v. Ellis, 403 So.2d 459, 467 (Fla. 5th DCA 1981). See also Toyota Motor Co. v. Moll, 438 So.2d 192, 195 (Fla. 4th DCA 1983); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108, 1110 (Fla. 4th DCA 1983); Dorsey v. Honda Motor Company, Ltd., 655 F.2d 650, 653, 656 (5th Cir. 1981) (applying Florida law).

Notwithstanding the total and complete absence of any corporate wrongdoing akin to any of the foregoing, the Fourth District rejected the necessity of a "smoking gun" or other conduct exceeding gross negligence, and imposed liability on CYANAMID because, as admitted from the beginning, it knew or should have known that its product was inherently dangerous. In other words, once a court finds that the Tampa Drug test is exceeded, requiring a warning, the case becomes a punitive damage case if the warning is deemed inadequate. The Fourth District's opinion may pay lip service to White Construction, but the decision and hold-

ing is in jurisdictional conflict with White Construction and Tampa Drug.

In order to allow manufacturers in Florida to assess their responsibilities with respect to the products they manufacture, and more importantly with respect to the warnings they place on products, it is respectfully urged that this Court take jurisdiction in this cause for the purpose of remedying the disarray in Florida product liability/punitive damage law that has been created by the Fourth District's decision in this cause.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Court accept jurisdiction and consider the merits of the dispute between these parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 14th day of June, 1985, to EARLE LEE BUTLER, of Butler & Pettit, P.A., 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, FL 33306; and to DON LACY, Post Office Box 6298, Tallahassee, FL 32314.

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